IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1238223
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Guy T. POUTER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1857

Guy T. POUTER

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 of Federal Regulations 137.30-1.

By order dated 24 July 1969, an Examiner of the United States Coast Guard at Cleveland, Ohio suspended Appellant's seaman documents for two months, plus four months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as an ordinary seaman on board SS WASHINGTON under authority of the document above captioned, Appellant:

1) from 21 April 1969 through 25 April 1969, while the vessel was "in a foreign port" wrongfully refused to turn to, and

2) on 24 April 1969, at sea, wrongfully disobeyed a lawful command of the master by refusing to go to his assigned lifeboat station.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of WASHINGTON.

In defense, Appellant offered in evidence his own testimony, a written statement of another seaman, and certain stipulations of fact.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specifications had been proved. The Examiner then served a written order on Appellant suspending all documents issued to Appellant for a period of two months, plus four months on twelve months' probation.

The entire decision was served on 18 August 1969. Appeal was

timely filed on 20 August 1969, and perfected on 5 November 1969.

FINDINGS OF FACT

On all dates in question, Appellant was serving as an ordinary seaman on board SS WASHINGTON and acting under authority of his document.

On 24 March 1969, Appellant signed aboard WASHINGTON for his first voyage as a merchant seaman. Appellant was then 27 years old, and wore his hair extremely long, with a long full beard and mustache. He became the target of abuse by his fellow sailors who impugned his character, integrity, and manhood. Appellant complained to the second mate about this treatment. On 17 April 1969 Appellant complained to the master who took no action. When the vessel arrived at Seoul, R.O.K., Appellant registered a complaint with State Department officials who said that they would refer the matter to the U. S. Coast Guard office at Yokohama, Japan.

On the morning of 21 April 1969, a seaman accosted Appellant in the messroom, complained of his inefficient work, used vulgar and abusive language, and stated that if Appellant did not get a haircut he might end up over the side. The other seaman then pushed Appellant down. Appellant's shirt was torn and he suffered some non-disabling bruises. Appellant then picked himself up and walked out with no further violence offered.

Appellant took to his fo'c'sle and did not work again until the vessel arrived at Yokohama on 25 april 1969. During this period Appellant disobeyed an order to appear at a lifeboat drill.

At Yokohama, a Coast Guard officer interrogated members of the crew. Appellant went back to work and had no further difficulties to the end of the voyage at Seattle, Washington.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that as to each conclusion of the Examiner and as to the order the Examiner's action is

1) unreasonable,

2) contrary to law, and

3) against the weight of the evidence.

More detailed attacks mounted on the Examiner's action will be discussed in the OPINION below.

APPEARANCE: Harvey L. Luchans, Esq., Legal Aid Society, Cleveland, Ohio.

OPINION

I

Appellant's assignments of error are so broadly stated as not to be truly assignments of error. No specific unreasonability is asserted, and no law is asserted to have been violated. To say that an Examiner's decision is against the weight of the evidence can mean, in administrative law, if there is to be found meaning, only that there is no substantial evidence to support the findings. An Examiner's Order, by itself cannot be against the weight of the evidence in any case.

To ascertain Appellant's real grounds for appeal his "Argument" must be analyzed.

II

One argument given is that the Examiner misconstrued the law in thinking that if the operative facts of the specifications were proved the wrongfulness of those acts was automatically established. Appellant argues:

(1) That the wrongfulness of the acts must be affirmatively proved, and

2) His defense proves that the acts were not wrongful.

There is an implicit inconsistency here, for if it was only the defense that proved the acts not to be wrongful there was already an apparent wrongfulness to be rebutted. There is also a fundamental misconception here.

III

While the word "wrongfully" is often almost mechanically inserted into specifications in these proceedings it is not always a necessary term for a valid allegation of misconduct. We are not concerned here with whether a naked allegation of "homicide" is enough to support an action under R.S. 4450 to suspend or revoke a seaman's document. We may look here to the language of certain

statutes, to customs of the sea, and to the everyday meaning of certain words.

46 U.S.C. 701, for example, spells out certain offenses for which a seaman may be penalized, confined aboard ship, or subjected to fine or imprisonment. Any such offense is obviously "misconduct" under R.S. 4450. If the statement of the allegation in the specification is couched in the language of the statute it is clearly sufficient in the administrative proceeding where the purpose of the pleading is notice, not niceties of common law distinctions or of criminal indictments.

Thus, the first offense enumerated in 46 U.S.C. 701 is "desertion". The statute does not speak of "wrongful desertion". It is enough to allege that a seaman deserted. While the elements of desertion must be proved, it need not be alleged that a desertion was wrongful. When substantial evidence has been introduced to establish the elements, it is for the respondent to persuade that an element is actually missing and that he did not in fact "desert".

To look at a specification in the instant case, it is seen that Appellant was declared to have disobeyed a lawful order. Disobedience to a lawful order is an offense in any kind of jurisprudence. If there is an order, and if there is disobedience, the only defense can be that the order was not lawful. The unlawfulness may be established by evidence that the person who gave the order had no authority to give it or that the circumstances of the person who was given the order were such as to make performance impossible. These defense show the unlawfulness of the order. There need be no allegation that the disobedience of the order was wrongful for if the order was lawful its disobedience was wrongful.

Similarly an allegation that one failed to perform a duty need not be alleged as wrongful. A duty, once it exists, must be performed. A valid defense which would justify or explain non-performance would not prove that a failure to perform a duty was not wrongful but circumstances have rendered the "duty" no longer a duty. Looking to the specification which covered the dates 21-25 April 1969, one sees that it alleges a "failure to turn to". In the parlance of the sea "turn to" does not mean merely "to work" but it does mean to perform a duty or to perform required work. In these proceedings it is enough to allege that a person failed to "turn to". It is not necessary that the failure be alleged as wrongful. The burden is upon the person charged to show that his failure to work was not a "failure to turn to".

Appellant's semantic argument, then, must be rejected as

without merit. What his argument ultimately resolves itself to is that his failure to work and his failure to obey the order to participate in the boat drill were so convincingly explained by him that as a matter of law they cannot be found to be failures to "turn to" or to "obey a lawful order".

IV

The only thing to be considered on this appeal is whether Appellant's evidence should necessarily have convinced the Examiner that he had the right not to work and the right not to attend the boat drill. The work "necessarily" is used here advisedly. The evidence did not convince the Examiner or the case would not be here in the first place. On the other hand, if there is substantial evidence to support the findings they will be upheld. Only if there is no substantial evidence to support the findings should I disturb the Examiner's findings. The official log entries are substantial evidence upon which to predicate the Examiner's findings and, on review, I need go no further, but to clarify some points the affirmative defense will be considered.

V

Appellant's claim is that he was so fearful for his safety that he was justified in not working. This claim must be summarily rejected as to his failure to participate in a boat drill.

Even if one accepted that a reasonable fear for personal safety existed by reason of the antagonism of fellow seamen, this would not excuse deliberate absence from an emergency drill. There is no need to go into details of drills, e.g., how they are supervised by officers, such as to remove the possibilities that Appellant says he feared.

Appellant's failure to attend the drill is as bad as a failure to perform assignments in an actual emergency. Drills are held to train for and provide for emergencies. As it appears now only physical disability could discharge one from a duty during actual emergencies or drills.

VI

There remains then, on the merits of this appeal, only the consideration of whether the fear of bodily harm was such as to discharge Appellant's refusal to perform work. There are court decisions in which a seaman's leaving his vessel were held not to be desertion because of conditions on the vessel. I am aware of no case in which conditions aboard a vessel justified a seaman in refusing to perform a day's work.

It might be argued, however, that if conditions would change an apparent desertion into a justifiable departure (noting that desertions usually occur in port), the same conditions would justify a failure to work while the vessel was at sea until the vessel reached a place at which the aggrieved seaman could depart the vessel. I am not prepared to accept this argument as a general proposition.

It is not as though Appellant could have retired to a hermetically sealed compartment, sound-proof, so that he could hear no derogatory remarks or threats, until such time as he could exercise his right to leave the ship. During the four days he refused to work he was not exposed to any real danger that would have justified leaving the ship in port.

VII

Ultimately, the appeal here fails, as the defense failed before the Examiner, because what had happened to Appellant did not come within those conditions which cause such fear as to justify a seaman in leaving his ship. In Appellant's own words, the episode occurred thus: "I got up to leave and he grabbed me, half hit me and pushed me against a table. I fell down, received bruises, torn shirt, no permanent damage that I know of. Of course, I got up and left at that point without anything further being said. I made a statement, if we were aboard land you couldn't get away with this." R-14. Even in Appellant's own description there is nothing to justify a reasonable fear of such harm as would authorize him to leave the ship, much less to refuse to work.

He says only that he was "half-hit". He says that he fell down. He does not say that his assailant tore his shirt. Although he says that nothing further was said, he did have the last work, and he left the scene without further harm or threat of harm. If Appellant would have had the Examiner believe that the conditional threat of his going overboard if he did not get a haircut justified his leaving the vessel, he would have to persuade the Examiner that this cutting must be done "right now" or he would have been thrown overboard. This was obviously not the case. Assuming that the threat was real it obviously, from the fact that Appellant was not disturbed again, meant that it would not be enforced until the vessel had reached a port. Appellant was under no threat until a port was reached, even on the most favorable interpretation of his testimony possible, and therefore should have worked until then.

VIII

I agree with one contention in Appellant's argument: The Examiner's suggestion that Appellant could have removed his danger by getting a haircut is irrelevant. If there was a real danger there was no obligation on Appellant to do or cease to do anything which he had a right not to do or to do so as to protect himself. If a reasonable merchant seaman could believe that he would be thrown overboard if he did not cut his hair at the behest of his fellow seamen, it is no solution to say that he could avert the danger by cutting his hair, which, under law, the custom of the sea, and his shipping agreement, he had the right to wear to any length he wished so long as it did not interfere with the performance of his duties.

The comment of the Examiner and the issue urged by Appellant are not important in this case.

IX

The important thing here is whether the defense offered by Appellant in this case was so overwhelming as to have required the Examiner to reject the voyage records as not constituting substantial evidence. I have analyzed Appellant's evidence only to show that if this were an initial decision in the case his defense should be rejected. The Examiner has already rejected it.

I find that as a matter of law Appellant's defense offered at hearing would not authorize a finding that he was justified in refusal to work. I find further that the Examiner's findings are based on substantial evidence, the voyage records of WASHINGTON which show the Appellant refused to perform his duties.

X

There is one question not specifically raised by Appellant which intrudes itself as I look at the record of this case. The evidence contains a log entry dated 21 April 1969 which shows that Appellant refused to turn to at Tobata, Japan, at 1310 that date. Another entry dated 24 April 1969, made at sea, shows that Appellant failed to perform duties on 22 and 23 April 1969. A third entry, dated 24 April 1969, records the failure of Appellant to participate in the fire and lifeboat drill. The fourth relevant entry, of 26 April 1969, made in Yokohama, Japan deals with refusal to turn to and perform duties on 24 and 25 April 1969.

The original specifications on which this case went to hearing contained these:

1) did "on or about 21 April 1969 through 25 April 1969 while said vessel was in a foreign port, wrongfully fail

to turn to; and

2) did "on or about 22 April 1969, 24 April 1969, and 25 April 1969, while said vessel was at sea, wrongfully refuse to perform your duties as Ordinary Seaman".

The Examiner noted that all dates in the specification covering matters "at sea" were embraced by the dates of the specification which alleged offenses "import". The log entries mentioned above show that on some occasions the vessel was at sea and that it was in at least two foreign ports. The Investigating Officer explained that the specifications were separated because at times during the period involved the vessel was at sea while at other times the vessel was in different foreign ports.

The Examiner attempted to cope with the problem presented by declaring that the specification which covered dates already included within the 21-25 April 1969 period would be considered as waived. He made no finding that the specification was proved or not proved. In considering that specification "waived", the Examiner found, ultimately, that Appellant refused to turn to at "a foreign port. Technically, Appellant was not found to have committed misconduct (except for the lifeboat drill offense) "at sea". Thus, the solution sought by the Examiner to the difficulty posed to him by the two specifications was not correct because it narrowed his ultimate findings on evidence that a continuing offense had taken place at sea and in two foreign ports to a finding that the continuing offense had occurred in one single foreign port. Since there was adequate evidence introduced, and litigation was involved, the Examiner could have correctly disposed of the problem by making his findings conform to the evidence rather than trying them in a strait-jacket of the pleadings. Kuhn v. C.A.B., CA D.C., (1950) F. 2nd. 839. The Examiner could have deleted the words "in a foreign port" in making his findings.

The problem need not have been posed to the Examiner in the first place if the specifications had been properly drawn. It has been a common practice to allege that a certain act of misconduct occurred "at sea" or "in a foreign port". Since national security is not involved, there is no longer a reason not to identify the foreign port is identifiable; but the drafter of the specifications was faced here with the fact that the continuing offense occurred in more than one port and at sea as well.

It is repeated that the purpose of the written allegations is notice. For many acts of misconduct cognizable under R.S. 4450 it is immaterial whether the acts were committed at sea or in this or that port. While time and place are elements in the notice of the misconduct to be inquired into, the place need not be identified as

"at sea" or in a certain port when the offense, as here, is continuing, is a shipboard offense, and would be an offense wherever the vessel was. It is enough, in such cases, merely to allege that the person for a period of five days refused to perform his duties aboard the vessel. With the dates sufficiently identified, it would not matter that the vessel had been in four different ports and had made three transits during the period.

In the instant case the Examiner was correct in seeing that the dates covering the sea periods were included within the dates covered by the "in port" allegations. The Examiner need not have considered the "at sea" allegations as "waived" but he could have accomplished by proper findings what the Investigating Officer should have accomplished by a properly worded notice.

All that was initially required was that Appellant be placed on notice that his refusal to perform duties on the vessel from 21 through 25 April 1969 was in question. For this continuing offense allegation of location of the vessel was unnecessary.

In view of the Investigating Officer's statement that the distinction between the two specifications was intended only to distinguish between the place of offenses, i.e. at sea or "in a foreign port", it is difficult to see why different language was used in framing the specifications. The "in port" specification used the language of failure to "turn to" while the "at sea" specification used the language of "refusal to perform the duties of ordinary seaman". The language used should have been the same in both cases, if it were correct in the first place to sever the specifications only on the basis of location of the ship. The distinction forced by the change of language required the additional step in the OPINION, Section III, to show that a refusal to "turn to" is a refusal to perform "duties".

The identification of place of an offense is adequately made, if the offense is one identifiable with shipboard activity, by an assertion that the offense occurred aboard the vessel. A specification covering thirty days of refusal to perform duties need not link the refusal to a multitude of ports or a multitude of periods at sea.

In the instant case it would have been enough if the original specification covering 21 through 25 April 1969 had alleged that Appellant had refused to perform duties aboard the vessel which was "variously at sea or in port" during the period of time involved.

ORDER

Order of the Examiner dated at Cleveland, Ohio on 24 July

1969, is AFFIRMED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 22nd day of September 1971.

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